

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT R. NEWMAN,) NO. CV 12-9205-SJO (MAN)
Petitioner,)
v.) ORDER DISMISSING PETITION
McEWAN (WARDEN),) AS SECOND OR SUCCESSIVE
Respondent.) AND DENYING A CERTIFICATE
) OF APPEALABILITY

Petitioner, a California state prisoner, filed a habeas petition, pursuant to 28 U.S.C. § 2254, on October 25, 2012 ("Petition"). The Petition is the second habeas corpus petition filed by Petitioner in this Court stemming from his 2005 state court conviction and sentence.

Under the Rules Governing Section 2254 Cases in the United States District Courts, a habeas petition filed by a prisoner in state custody "must" be summarily dismissed "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court. . . ." Rule 4, 28 U.S.C. foll. § 2254. For the reasons set forth below, the Petition must be, and is, DISMISSED as second or successive, pursuant to 28 U.S.C. § 2244(b).

BACKGROUND

3 On June 26, 2007, Petitioner filed a Section 2254 habeas petition
4 in Case No. CV 12-9205-SJO (MAN) (the "Prior Action"). The Prior Action
5 petition arose out of the same 2005 state court conviction on which the
6 present Petition is based. The Prior Action petition asserted: two
7 claims based on alleged prosecutorial misconduct during closing argument
8 and in failing to promptly disclose a witness's statement; one claim
9 based on the alleged ineffective assistance of trial counsel in failing
10 to object to a detective's testimony; one claim alleging that due
11 process was violated by the admission of evidence of Petitioner's
12 earlier possession of a gun; and one claim alleging a due process
13 violation based on the trial court's failure to continue the trial at
14 Petitioner's request. During the pendency of the Prior Action,
15 Petitioner filed an interlocutory appeal, which was dismissed on August
16 11, 2011, for lack of jurisdiction (Case No. 11-56149).¹ The Prior
17 Action was resolved adversely to Petitioner on the merits, and habeas
18 relief was denied by Judgment entered on July 8, 2011. Petitioner
19 appealed, and on October 19, 2012, the Ninth Circuit denied a
20 certificate of appealability (Case No. 11-56583).

22 The instant Petition alleges one or more claims challenging
23 Petitioner's 2005 conviction. Only one claim is alleged within the form
24 Petition itself, *i.e.*, that Petitioner's appellate and counsel provided
25 ineffective assistance by failing to challenge the trial court's

27 1 Pursuant to Rule 201 of the Federal Rules of Evidence, the
Court has taken judicial notice of its records and files, as well as the
dockets for the United States Court of Appeals for the Ninth Circuit
available electronically through the PACER system.
28

1 decision to admit into evidence a gun that a prosecution expert could
2 not state, with certainty, was the murder weapon. (Petition at 5.) The
3 various attachments to the Petition indicate that Petitioner may be
4 asserting nine additional claims based on allegations that: gang
5 membership evidence should not have been admitted; trial counsel
6 provided ineffective assistance; witnesses provided perjured, "tainted,"
7 and inconsistent testimony; the prosecutor committed misconduct; and two
8 witnesses lacked credibility. A review of the dockets for the Ninth
9 Circuit shows that Petitioner has not sought or obtained leave to file
10 a second or successive Section 2254 habeas petition asserting any of the
11 claims alleged in the instant Petition or, indeed, any claims at all.

12

13 DISCUSSION

14

15 State habeas petitioners generally may file only one federal habeas
16 petition challenging a particular state conviction and/or sentence.
17 See, e.g., 28 U.S.C. § 2244(b)(1) (courts must dismiss a claim presented
18 in a second or successive petition when that claim was presented in a
19 prior petition) and § 2244(b)(2) (with several exceptions not applicable
20 here, courts must dismiss a claim presented in a second or successive
21 petition when that claim was not presented in a prior petition). "A
22 habeas petition is second or successive . . . if it raises claims that
23 were or could have been adjudicated on the merits" in an earlier Section
24 2254 petition. McNabb v. Yates, 576 F.3d 1028, 1029 (9th Cir. 2009).

25

26 In those instances when Section 2244(b) provides a basis for
27 pursuing a second or successive Section 2254 habeas petition, state
28 habeas petitioners seeking relief in this district court must first

1 obtain authorization from the Ninth Circuit before filing any such
2 second or successive petition. 28 U.S.C. § 2244(b)(3). The Ninth
3 Circuit "may authorize the filing of the second or successive [petition]
4 only if it presents a claim not previously raised that satisfies one of
5 the two grounds articulated in § 2242(b)(2)." Burton v. Stewart, 549
6 U.S. 147, 153, 127 S. Ct. 793, 796 (2007).

7
8 By the Prior Action, Petitioner sought Section 2254 relief based on
9 the same 2005 conviction at issue here, and his habeas petition was
10 resolved adversely to him on its merits. His present challenge to the
11 validity of his 2005 conviction does not rest on newly-discovered
12 evidence or a new rule of constitutional law. Accordingly, the current
13 Petition is second or successive within the meaning of Section 2244(b).²

14
15 As Petitioner has not obtained permission from the Ninth Circuit to
16 bring a second or successive petition, this Court lacks jurisdiction to
17 consider the instant Petition. 28 U.S.C. § 2244(b); see also Burton,
18 549 U.S. at 157, 127 S. Ct. at 799 (district court lacks jurisdiction to
19 consider the merits of a second or successive petition absent prior
20 authorization from the circuit court). Accordingly, IT IS ORDERED that:
21 the Petition is DISMISSED; and Judgment shall be entered dismissing this
22 action without prejudice.

23
24 In addition, pursuant to Rule 11(a) of the Rules Governing Section
25 2254 Cases in the United States District Courts, the Court has
26

27 ² The instant Petition also appears to be substantially untimely
28 given that Petitioner's limitations period commenced running in late
June 2006, and likely expired in late June 2007.

1 considered whether a certificate of appealability is warranted in this
2 case. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484-
3 85, 120 S. Ct. 1595, 1604 (2000). The Court concludes that a
4 certificate of appealability is unwarranted, and thus, a certificate of
5 appealability is DENIED.

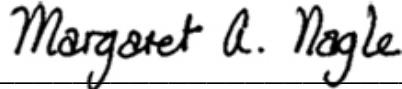
6
7 IT IS SO ORDERED.
8

9 DATED: November 2, 2012.
10
11



S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

13 PRESENTED BY:
14



MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE
15
16
17
18
19
20
21
22
23
24
25
26
27
28